

STATE OF MICHIGAN
COURT OF APPEALS

M.C. GUTHERIE LUMBER COMPANY,

Plaintiff/Counter Defendant/
Third Party Plaintiff-Appellee,

v

LIVONIA HOSPITALITY CORP., THOMAS
GUASTELLO, d/b/a/ CENTER MANAGEMENT
SERVICE, and THOMAS GUASTELLO
CONSTRUCTION,

Defendants/Counter Plaintiffs/
Appellants,

and

CENTURY TRUSS COMPANY OF MICHIGAN,

Third-Party Defendant,

C & K CONSTRUCTION, INC.,

Plaintiff-Appellee,

v

LIVONIA HOSPITALITY CORP. and
THOMAS GUASTELLO CONSTRUCTION,

Defendants-Appellants.

UNPUBLISHED
September 12, 1997

Nos. 167228; 167658; 168081
Wayne Circuit Court
LC No. 91-112712-CZ

No. 167659
Wayne Circuit Court
LC No. 91-131597-CZ

Before: Taylor, P.J., and Griffin and Saad, JJ.

PER CURIAM.

In these consolidated appeals, defendants appeal as of right from the trial court judgments entered in favor of plaintiffs M.C. Guthrie Lumber Co. (“Guthrie”) and C&K Construction (“C&K”) in their suits for non-payment following their provision of goods and services for defendants’ construction of a hotel. We affirm.

I

Defendants’ first allegation of error concerns the trial court’s award of attorneys fees to plaintiff C&K. The trial court initially entered a judgment of \$11,168 in favor of C&K on its construction lien claim against defendants, and then awarded C&K costs, interest and attorney fees in an amount which reflected approximately one-third of this figure. Thereafter, C&K sought additional fees pursuant to the mediation sanctions rule, MCR 2.403 and the offer of judgment sanction rule, MCR 2.405. Following a hearing, the court awarded C&K \$21,179.50 in attorney fees incurred between the date of defendants’ rejections of C&K’s offer of judgment (March 20, 1991) and trial (January 21, 1993). Defendants appeal only the second order, awarding attorney fees to C&K pursuant to the offer of judgment rule, MCR 2.405.

Contrary to defendants’ assertion, the mere fact that the offer of judgment was submitted with the complaint and that it was in the amount prayed for in the complaint does not necessitate a finding that the attorney fees are not in “the interest of justice.” MCR 2.405(D)(3). Here, the offer, while made at the beginning of the case, was not de minimus and there was no evidence of gamesmanship. *Luidens v 63rd Dist Ct*, 219 Mich App 24, 35; 555 NW2d 709 (1996).

Further, Michigan law does not preclude “simultaneous recovery” of fees under both a statute and a court rule where the *purposes* underlying the individual statute and the court rule are sufficiently distinct. See *Howard v Canteen Corp*, 192 Mich App 427, 440-441; 481 NW2d 718 (1992) (purposes behind Civil Rights Act attorney fee provision and MCR 2.403(O) [mediation sanctions] are sufficiently distinct to permit attorney fees under both provisions); *Dep’t of Transportation v Dyl*, 177 Mich App 33, 36-37; 441 NW2d 18 (1989) (purposes behind statutory award of attorney fees in condemnation cases and MCR 2.405 [offers to stipulate to judgment] sufficiently distinct); *Kondratek v Auto Club Ins Ass*, 163 Mich App 634, 638-639; 414 NW2d 903 (1987) (purposes behind attorney fee provisions of no-fault act and MCR 2.403(O) sufficiently distinct). For the reasons stated in these decisions, we find no error in the “duplicative” nature of the attorney fees awarded.

II

Next, the trial court properly granted directed verdict motions in favor of third party defendant Century Truss and Guthrie on the issue of whether there was a breach of the warranty of merchantability. In reviewing a trial court’s failure to grant a defendant’s motion for a directed verdict or judgment notwithstanding the verdict, we examine the testimony and all legitimate inferences that may

be drawn in the light most favorable to the plaintiff. If reasonable jurors could honestly have reached different conclusions, the motion should have been denied. If reasonable jurors could disagree, neither the trial court nor this Court has the authority to substitute its judgment for that of the jury. *Matras v Amoco Oil Co*, 424 Mich 675, 681-682; 385 NW2d 586 (1986).

Here, the evidence established that the trusses had no defect in design or construction and were built in accordance with specifications. Further, there was no duty to warn about the potential for trust uplift, as both defendants and Guthrie were knowledgeable users charged with sufficient expertise on how to use the product safely. *Aetna Casualty & Surety Co v Ralph Wilson Plastics Co*, 202 Mich App 540, 546-547; 509 NW2d 520 (1993).

III

Finally, defendants contend that the court erred in its award of attorney fees to Guthrie. Whether to award attorney fees is within the trial court's discretion, and this Court will not find an abuse of discretion unless the result so violates fact and logic that it constitutes perversity of will, defiance of judgment or the exercise of passion or bias. *Mitchell v Dahlberg*, 215 Mich App 718, 729; 547 NW2d 74 (1996).

In this case, the court did not abuse its discretion in finding that \$160 an hour was a reasonable fee. The evidence established that this hourly rate was reasonable and well within the range of fees being charged by construction attorneys, that counsel for Guthrie was able, and that this case had technical aspects. Under these circumstances, the court did not err in finding the fee requested to be reasonable.

We reject defendants' claim that contractual attorney fees should have only been assessed from the date of Guthrie's amended complaint. Since the claim asserted in the amended complaint arose out of the transaction set forth in the original complaint, the relation back rules applied. MCR 2.118.

Finally, we find no merit to defendants' claim that Guthrie failed to prevail in full. The jury entered verdicts in plaintiff's favor on all counts, and the stipulation that defendants were entitled to a credit of less than \$900 (which the jury factored into its award) did not cause defendants to prevail on any count. Accordingly, we affirm the attorney fee award to Guthrie.

Affirmed. Guthrie and C&K Construction being prevailing parties, they may tax their costs on appeal pursuant to MCR 7.219.

/s/ Clifford W. Taylor
/s/ Richard Allen Griffin
/s/ Henry William Saad